Supreme Court, U.S.
FILED
DEC - 5 2016
OFFICE OF THE CLERK

No. 16-399

In the Supreme Court of the United States

ANTHONY W. PERRY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 5 U.S.C. 7703(b)(2), which creates an exception to exclusive Federal Circuit review of Merit Systems Protection Board decisions in cases where "an action which [an] employee * * * may appeal to the [Board]" is alleged to involve discrimination, 5 U.S.C. 7702(a)(1)(A), applies to a case in which the Board determines that the relevant action is not one that an employee may appeal to the Board.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Burzynski v. *Cohen*, 264 F.3d 611 (6th Cir. 2001) 15
Conforto v. *MSPB*, 713 F.3d 1111 (Fed. Cir. 2013) ... *passim*
Downey v. *Runyon*, 160 F.3d 139 (2d Cir. 1998) 15
Garcia v. *Department of Homeland Sec.*, 437 F.3d 1322 (Fed. Cir. 2006) 4, 10
Harms v. *IRS*, 321 F.3d 1001 (10th Cir.), cert. denied, 540 U.S. 858 (2003) 15
Hertz Corp. v. *Friend*, 559 U.S. 77 (2010) 9
Kloeckner v. *Solis*:
639 F.3d 834 (8th Cir. 2011) 15
133 S. Ct. 596 (2012) ..... *passim*
Lindahl v. *OPM*, 470 U.S. 768 (1985) 2
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 16
Powell v. *Department of Def.*, 158 F.3d 597 (D.C. Cir. 1998) 5, 16
Sloan v. *West*, 140 F.3d 1255 (9th Cir. 1998) 16
Synan v. *MSPB*, 765 F.2d 1099 (Fed. Cir. 1985) 2
United States v. *Fausto*, 484 U.S. 439 (1988) 2
Wal-Mart Stores, Inc. v. *Dukes*, 564 U.S. 338 (2011) 10

Statutes and regulations: Page

Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.* 2
5 U.S.C. 1201 2
5 U.S.C. 1204(a)(1) 2
5 U.S.C. 7512 2
5 U.S.C. 7512(1)-(5) 4
5 U.S.C. 7512(2) 8
5 U.S.C. 7701(a) 2
5 U.S.C. 7702(a)(1) 3, 5, 7, 13
5 U.S.C. 7702(a)(1)(A) 6, 8, 9, 13
5 U.S.C. 7702(a)(1)(A)-(B) 3
5 U.S.C. 7702(a)(2)-(3) 3
5 U.S.C. 7702(b)(1) 3
5 U.S.C. 7703(b)(1)(A) 2
5 U.S.C. 7703(b)(1)(B) 2
5 U.S.C. 7703(b)(2) ..... *passim*
5 U.S.C. 7703(d) 2
28 U.S.C. 1295(a)(9) 2
28 U.S.C. 1631 ..... 4, 14
5 C.F.R.:
Section 752.401(b)(9) 4
Section 1200.1 2
Section 1201.12 13
Section 1201.22(c) 13

In the Supreme Court of the United States

No. 16-399

ANTHONY W. PERRY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 829 F.3d 760. The final order of the Merit Systems Protection Board (Pet. App. 20a-31a) is unreported but is available at 2014 WL 5358308. The initial decision of an administrative judge (Pet. App. 32a-58a) is unreported. An earlier order of the Merit Systems Protection Board (Pet. App. 59a-70a) is unreported but is available at 2013 WL 9678428. An earlier initial decision of an administrative judge (Pet. App. 71a-80a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2016. The petition for a writ of certiorari was filed on September 27, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, creates a comprehensive "framework for evaluating adverse personnel actions against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (brackets omitted) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 774 (1985)). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.* Among other things, the CSRA creates the Merit Systems Protection Board (MSPB or Board), "an independent Government agency that operates like a court," 5 C.F.R. 1200.1, and has "jurisdiction" to hear and decide certain employment-related matters, 5 U.S.C. 1204(a)(1). See 5 U.S.C. 1201. "The jurisdiction of the [B]oard is not plenary but is limited to those actions which are made appealable to it by law, rule, or regulation." *Synan* v. *MSPB*, 765 F.2d 1099, 1100 (Fed. Cir. 1985); see 5 U.S.C. 7701(a); see also, *e.g.*, 5 U.S.C. 7512 (listing appealable actions).

In general, judicial review of "a final order or final decision" of the Board falls within the "exclusive jurisdiction" of the Federal Circuit. 28 U.S.C. 1295(a)(9); see 5 U.S.C. 7703(b)(1)(A) and (d). The CSRA includes two exceptions to that general rule. See 5 U.S.C. 7703(b)(1)(B) and (b)(2). The only one that is relevant here is an exception for "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2); see Pet. App. 5a. Such cases, commonly known as "mixed cases," are defined as ones in which an "employee or applicant for employment" both "has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board" and "alleges that a basis for the action was

discrimination prohibited by" one of several listed antidiscrimination laws. 5 U.S.C. 7702(a)(1)(A)-(B). An employee with such a case may bring that case before the MSPB and, if unsuccessful there, file suit in district court, rather than seeking review in the Federal Circuit. 5 U.S.C. 7702(a)(1); see 5 U.S.C. 7702(a)(2)-(3) and (b)(1), 7703(b)(2).

2. Petitioner is a former employee of the United States Census Bureau who faced removal on charges that he was absent from work for hours at a time and refused to document his time properly. Pet. App. 3a. In response to the notice of removal, petitioner claimed that he had an informal arrangement that permitted him to take walking breaks to relieve a medical condition. *Ibid.* Petitioner eventually entered into a settlement agreement with the Bureau, under which, *inter alia*, the Bureau agreed to dismiss the pending disciplinary action and petitioner agreed to serve a 30-day suspension, take an early retirement, and dismiss a complaint he had filed with the Equal Employment Opportunity Commission. *Ibid.*

Petitioner later appealed his suspension and retirement to the MSPB, alleging that the Bureau's charges had been motivated by age, race, and disability discrimination and retaliation for his filing of discrimination claims. Pet. App. 4a. He also alleged that the Bureau coerced him into signing the settlement agreement by threatening baseless discriminatory adverse employment actions and by misrepresenting his procedural rights. *Id.* at 4a, 22a-23a. That second set of allegations was critical to the Board's jurisdiction. *Id.* at 4a. "[B]ecause the Board generally lacks jurisdiction to review voluntarily accepted actions, * * * its jurisdiction in this case depended on the validity of

[petitioner's] contention that the settlement—and hence, the resulting suspension and retirement—had been involuntary." *Ibid.* (citing 5 U.S.C. 7512(1)-(5); 5 C.F.R. 752.401(b)(9); *Garcia* v. *Department of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc)).

An MSPB administrative judge ultimately determined, following a hearing, that petitioner had "failed to prove that he was coerced or detrimentally relied on misinformation when he agreed to settle his appeals." Pet. App. 33a; see *id.* at 22a-23a. The administrative judge accordingly concluded that the "appeal must be dismissed for lack of jurisdiction." *Id.* at 33a. The Board affirmed, explaining, *inter alia*, that "contrary to [petitioner's] contention that he is entitled to mixed appeal rights, his appeal is not a mixed case because we lack jurisdiction over it." *Id.* at 30a; see *id.* at 20a-32a.

3. Petitioner, proceeding pro se, sought judicial review in the D.C. Circuit. Pet. App. 4a. He ultimately acknowledged, however, that no provision of the CSRA would give the D.C. Circuit jurisdiction over the case. *Id.* at 5a. The court of appeals accordingly considered, with the aid of an appointed amicus curiae, the question of where to transfer the case. *Ibid.*; see 28 U.S.C. 1631 (permitting transfers of petitions for review of administrative action in order to cure lack of jurisdiction). The court concluded that the Board's decision was within the scope of the Federal Circuit's exclusive review and ordered the case to be transferred there. Pet. App. 1a-15a.

The court of appeals rejected the argument that 5 U.S.C. 7703(b)(2)'s special rule for mixed cases—*i.e.*, cases in which an employee alleges discrimination in "an action which [he] may appeal to the [Board],"

5 U.S.C. 7702(a)(1)—should apply to a case in which the underlying action has been determined not to be appealable to the Board. Pet. App. 7a-15a. The court observed that one of its previous decisions, *Powell* v. *Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998), had identified the Federal Circuit as the proper venue for judicial review in such a case. Pet. App. 7a-8a. And the court determined that *Powell*'s holding with respect to such MSPB "*jurisdictional* dismissals" was consistent with this Court's intervening decision in *Kloeckner* v. *Solis*, 133 S. Ct. 596 (2012), which held that MSPB "*procedural* dismissals" in mixed cases should be reviewed "in district court." Pet. App. 3a; see *id.* at 9a-15a.

The court of appeals noted that petitioner (and his amicus) "agree[d] that *Kloeckner* did not involve the precise issue raised by * * * this case." Pet. App. 8a. As the court explained, "*Kloeckner* did not involve a jurisdictional dismissal," but instead the dismissal "on the procedural ground of untimeliness" of an "adverse action" that was "no doubt * * * within the Board's jurisdiction." *Ibid.* The court observed that *Kloeckner* "specifically defined the issue" before it "by reference to MSPB dismissals on 'procedural grounds,'" *id.* at 8a-9a (quoting *Kloeckner*, 133 S. Ct. at 600, 602, 603, 607), and that briefing and oral argument had highlighted the potential for a "material distinction between procedural and jurisdictional dismissals" with respect to judicial review. *Id.* at 9a-10a. And the court highlighted *Kloeckner*'s emphasis on the fact that "[n]o one here contests that Kloeckner * * * was affected by an action (*i.e.*, removal) appealable to the MSPB." *Id.* at 12a (brackets in original) (quoting *Kloeckner*, 133 S. Ct at 604).

The court of appeals accordingly joined the Federal Circuit in concluding that this Court's holding in *Kloeckner* does not extend to MSPB jurisdictional dismissals. Pet. App. 12a-14a (citing *Conforto* v. *MSPB*, 713 F.3d 1111 (Fed. Cir. 2013)). The court of appeals reasoned that the language of the CSRA—which "describes a mixed case as one in which the employee both alleges discrimination and 'has been affected by an action which [she] *may appeal* to the' MSPB"—"suggests a distinction between jurisdictional dismissals * * * and procedural dismissals." *Id.* at 11a-12a (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)). In a procedural dismissal, even if an appeal was brought "in a procedurally deficient fashion," the "*action* affecting the employee" nevertheless "is one she can appeal to the Board," and the case can in fact be heard by the Board if it chooses to disregard the procedural defect. *Id.* at 13a-14a. In a jurisdictional dismissal, however, the employee "has been affected by an action which she may *not* appeal to the MSPB." *Id.* at 12a. "The case, in other words, turns out not to be a mixed case after all—it is not one 'appealable to the MSPB.'" *Ibid.* (quoting *Kloeckner*, 133 S. Ct. at 604).

ARGUMENT

The court of appeals correctly held that when the MSPB determines that it does not have jurisdiction to review a particular personnel action, the case should not be treated, for purposes of judicial review, as one involving "an action which the employee * * * may appeal to the Merit Systems Protection Board," 5 U.S.C. 7702(a)(1)(A); see 5 U.S.C. 7703(b)(2). The decision below does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The CSRA's special judicial-review provision for mixed cases, 5 U.S.C. 7703(b)(2), is limited to cases in which an employee (or applicant for employment) "challenges as discriminatory *a personnel action appealable to the MSPB*." *Kloeckner* v. *Solis*, 133 S. Ct. 596, 602 (2012) (emphasis added). Specifically, the exception to Federal Circuit review applies only when an employee *both* "has been affected by an action which [he] may appeal to the Merit Systems Protection Board" *and* "alleges that a basis for the action was discrimination prohibited by" a listed antidiscrimination law. 5 U.S.C. 7702(a)(1); see 5 U.S.C. 7703(b)(2); *Kloeckner*, 133 S. Ct. at 601-602.

Not all unfavorable personnel actions meet the first criterion. Rather, "[i]f (but only if) the action is particularly serious"—such as "a removal from employment or a reduction in grade or pay"—does "the affected employee ha[ve] a right to appeal the agency's decision to the MSPB." *Kloeckner*, 133 S. Ct. at 600. "Thus, for example, if an employee sought Board review of a minor disciplinary action, such as suspension for fewer than 15 days, the appeal would plainly be outside the Board's jurisdiction, and review of the Board's decision would be in [the Federal Circuit], not in the district court, even if the employee contended that the action was taken because of discriminatory animus." *Conforto* v. *MSPB*, 713 F.3d 1111, 1118 (Fed. Cir. 2013).

Accordingly, "the plain import of th[e] statutory language is that a purported mixed case appeal is reviewed by a district court only if the Board has jurisdiction to decide the appeal from the adverse action in issue." *Conforto*, 713 F.3d at 1118. Where, as here, the Board has determined that it lacks jurisdiction

because the underlying action is not one that is appealable to it, there is no valid foundation for treating the case as a mixed case for purposes of judicial review. See *ibid.*; Pet. App. 12a-13a.

2. a. Petitioner does not directly dispute the general proposition that an employee who has *not* been "affected by an action which [he] may appeal to the Merit Systems Protection Board," 5 U.S.C. 7702(a)(1)(A), is not bringing a mixed case and thus cannot avail himself of the special judicial-review procedures that 5 U.S.C. 7703(b)(2) provides for such cases. He contends, however, that notwithstanding the MSPB's determination that the underlying action in his case is not appealable and that no mixed case is presented, Section 7703(b)(2) should nevertheless apply. In advancing that argument, he appears to be advocating one of three potential legal rules, all of which are unsound.

The first potential rule would be that *every* case should be treated as involving "an action which [an employee] may appeal to the Merit Systems Protection Board," 5 U.S.C. 7702(a)(1)(A), so long as "a claimant *alleges*" that it involves such an action, Pet. 16 (emphasis added), no matter how transparently incorrect the claimant's allegation may be. Under that rule, notwithstanding that a suspended employee typically has the right to appeal to the MSPB only when the suspension exceeds 14 days, see 5 U.S.C. 7512(2), an employee suspended for one day but who claims to have been suspended for a month is entitled to district-court review of an MSPB decision dismissing his appeal for lack of jurisdiction. That rule makes no sense and cannot be squared with the statutory text, which "requires that the Board actually have jurisdiction over

the employee's claim, not merely that the employee allege Board jurisdiction." *Conforto*, 713 F.3d at 1118; see 5 U.S.C. 7702(a)(1)(A).

The second potential rule would be that Section 7703(b)(2) applies to a *subset* of cases in which an employee contests the MSPB's determination that the underlying action is not appealable. But petitioner does not identify what that subset would be, and the CSRA itself provides no basis for differentiating among cases that involve such a determination by the Board. The requirement of "an action which the employee * * * may appeal to the Merit Systems Protection Board" speaks in absolute terms. Nothing in the statute suggests that, when the MSPB has determined that an action is not appealable, the action may be treated as though it were, provided that some (unspecified) decisionmaker finds some (unspecified) criterion to be met. Moreover, as petitioner himself acknowledges, "administrative simplicity is a major virtue in a jurisdictional statute," Pet. 18 (quoting *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010)), and a rule that subdivides the universe of MSPB nonappealability determinations based on nonstatutory criteria applied by an unidentified decisionmaker would lack that virtue.

The third potential rule would be that *this particular case* should be treated as a mixed case, because (in petitioner's view) the critical issue for purposes of the underlying action's appealability to the Board—"whether or not the settlement was voluntary"—can also be seen, in light of petitioner's claim that the settlement was discriminatorily coerced, as "the key merits issue." Pet. 14 (emphasis omitted); see Pet. 14-16. As a threshold matter, such a fact-specific rule would be inconsistent with the more general question

presented in the petition—which presumes a "jurisdictional" dismissal, not a merits decision, see Pet. i—and would address only cases that are akin to petitioner's. In any event, petitioner's argument is misconceived. "The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation," *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351-352 (2011), and does not make the MSPB's jurisdictional determination in this case any less jurisdictional. Furthermore, the Federal Circuit has explained that, in the context of an allegedly involuntary separation, "involuntariness and discrimination" are "distinct issues," because "[c]oercion can be found without proof that the improper conduct was the product of discrimination, and discrimination can be found without proof that the discriminatory conduct was so serious as to compel the employee to resign." *Conforto*, 713 F.3d at 1120 (citing *Garcia* v. *Department of Homeland Sec.*, 437 F.3d 1322, 1341 (Fed. Cir. 2006) (en banc)).

b. Contrary to petitioner's contention (Pet. 9-14), nothing in this Court's decision in *Kloeckner* supports the argument that this case should have been treated as a mixed case. The Court held in *Kloeckner* that "when the MSPB dismisses an appeal alleging discrimination * * * on *procedural* grounds," the employee's petition for judicial review "should go to district court." 133 S. Ct. at 600 (emphasis added). As the court of appeals in this case observed (Pet. App. 9a-10a), *Kloeckner*'s framing of the question presented as involving an MSPB dismissal on "procedural grounds," not jurisdictional grounds, was repeated

throughout the decision. See *Kloeckner*, 133 S. Ct. at 600, 602, 603, 607.

The Court in *Kloeckner* emphasized that "[n]o one here contests that Kloeckner brought a mixed case—that she was affected by an action (*i.e.* removal) appealable to the MSPB and that she alleged discrimination prohibited by an enumerated federal law." 133 S. Ct. at 604. By satisfying those statutory requirements, she had "brought the kind of case that the CSRA routes * * * to district court," "[r]egardless whether the MSPB dismissed her claim on the merits or instead threw it out as untimely." *Ibid.* Those requirements, the Court explained, are what "matters"—indeed, "all that matters"—"under the CSRA's terms." *Ibid.*

This case, in contrast, differs from *Kloeckner* on the issue "that matters," 133 S. Ct. at 604. Unlike in *Kloeckner*, the MSPB here determined that petitioner was *not* "affected by an action * * * appealable to the MSPB" and thus had *not* "brought the kind of case that the CSRA routes * * * to district court," *ibid.*; see Pet. App. 20a-32a. Petitioner's reliance on *Kloeckner* for the proposition that "'mixed cases shall be filed in district court,' regardless of whether the MSPB reached the merits of the discrimination claim or disposed of the case on non-merits grounds," Pet. 10 (quoting *Kloeckner*, 133 S. Ct. at 604), thus simply begs the question whether this is a "mixed case" to begin with.

Petitioner would have the courts treat this as a mixed case simply because he labels it one, irrespective of the MSPB's contrary determination. For reasons already discussed, that is not a reasonable construction of the CSRA. "[W]hen an employee brings a

case she believes qualifies as a mixed case to the MSPB but the Board dismisses her appeal based on a lack of jurisdiction, * * * [t]he case * * * turns out not to be a mixed case after all—it is not one 'appealable to the MSPB.'" Pet. App. 12a (quoting *Kloeckner*, 133 S. Ct. at 604). If an employee believes that the MSPB has erred in its jurisdictional determination, he may raise that issue in the Federal Circuit; if he prevails, the case will be remanded to the MSPB for adjudication and then be treated as a mixed case for purposes of any further judicial review.

Petitioner attempts (Pet. 10-13) to support his reading of *Kloeckner* by noting that both parties in *Kloeckner* disavowed a distinction between procedural and jurisdictional dismissals. But the fact that the parties in *Kloeckner* did not advocate a distinction between jurisdictional and procedural MSPB dismissals makes it even more significant that this Court consistently limited its analysis and holding to MSPB dismissals on "procedural grounds." And the suggestion (Pet. 19) that the government has taken "diametrically opposed positions" in this case and *Kloeckner* is unfounded. The government in *Kloeckner* took as a given that the MSPB's jurisdictional dismissals were not reviewable in district court and advanced that as a reason why the MSPB's procedural dismissals should not be reviewable in district court either. See Pet. 11-12 (citing government's briefs). That argument did not prevail, but nothing in *Kloeckner* suggests that cases should be treated as mixed even when the MSPB determines that they do not meet the statutory criteria for such treatment.

c. Petitioner's additional arguments are similarly flawed.

Petitioner errs in suggesting (*e.g.*, Pet. 14) that the CSRA provides no textual basis for distinguishing between procedural and jurisdictional dismissals in this context. As the court of appeals explained, under the plain language of the statute, when an appeal is dismissed on procedural grounds, the employee can still "be seen to have 'been affected by an action which [she] may appeal to the' MSPB." Pet. App. 13a (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)). "That statutory language draws attention to the contested 'action,' and in the case of a procedural dismissal, the *action* affecting the employee is one she can appeal to the Board." *Ibid.* Indeed, the Board has authority to "excuse the procedural error and permit the appeal to go forward." *Ibid.*; see *id.* at 13a-14a (citing 5 C.F.R. 1201.12, 1201.22(c); *Conforto*, 713 F.3d at 1118 n.1). In cases where the Board dismisses for lack of jurisdiction, however, it "necessarily concludes" that the employee "has not 'been affected by an action which [she] may appeal to the' MSPB." Pet. App. 12a (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)).

Petitioner likewise errs in suggesting (Pet. 16) that the court of appeals' approach "renders illogical" the "statutory requirement for the Board to decide 'mixed' cases within 120 days," which appears in 5 U.S.C. 7702(a)(1). Section 7702(a)(1)'s time limit for "decid[ing] both the issue of discrimination and the appealable action," in a case where an employee alleges discrimination in "an action which the employee or applicant may appeal to the Merit Systems Protection Board," cannot plausibly be construed to require treating a case that does not involve such an action as one that does. See *Kloeckner*, 133 S. Ct. at 606 (construing 120-day rule as "only a timing requirement" and

declining to view it as determinative of the forum for judicial review). Contrary to petitioner's contention, the time limit does not apply when "a claimant *alleges*" that she has brought a mixed case, Pet. 16 (emphasis added); it applies only when the claimant *has* brought a mixed case. See *Conforto*, 713 F.3d at 1118. And nothing in the time limit necessitates "the determination of whether a case is 'mixed' must occur at the time of filing," Pet. 16 (emphasis omitted). Although an employee's allegation at the time of filing that he has been subject to a discriminatory appealable action might require that his case presumptively be treated as subject to the time limit, that allegation would not preclude the Board from later determining that the allegation of appealability is incorrect and that it lacks jurisdiction.

Finally, petitioner provides no meaningful support for his contention (Pet. 17) that routing cases to the right court will present "monumental practical difficulties." The Board's decision here clearly stated that "contrary to [petitioner's] contention that he is entitled to mixed appeal rights, his appeal is not a mixed case because we lack jurisdiction over it," and the Board explicitly informed petitioner that he could seek judicial review in the Federal Circuit. Pet. App. 30a. Petitioner presents no evidence that other decisions will be more confusing. And where an employee mistakenly files in the wrong court, that court will have the ability to transfer the case to the correct one—as the court of appeals did here, when petitioner filed in a court that was not the appropriate forum for either a mixed case or a non-mixed case. See 28 U.S.C. 1631; Pet. App. 5a.

3. Petitioner's assertion (Pet. 19) that "the courts of appeals are squarely divided" on the question presented is incorrect. Petitioner acknowledges (*ibid.*) that the decision below accords with decisions of the Second, Tenth, and Federal Circuits, all of which have interpreted the CSRA to vest the Federal Circuit with exclusive jurisdiction in cases like this. See *Conforto*, 713 F.3d at 1118; *Harms* v. *IRS*, 321 F.3d 1001, 1008 (10th Cir.), cert. denied, 540 U.S. 858 (2003); *Downey* v. *Runyon*, 160 F.3d 139, 146 (2d Cir. 1998). The only decision petitioner asserts (Pet. 19) to be in conflict with the decision below is the Eighth Circuit's decision in *Kloeckner* v. *Solis*, 639 F.3d 834 (2011), which was subsequently reversed by this Court, see 133 S. Ct. at 607. It is unclear what precedential weight a future Eighth Circuit panel would attach to that decision. And in any event, the Eighth Circuit in *Kloeckner* reasoned that *both* jurisdictional *and* procedural dismissals should be reviewed in the Federal Circuit. See 639 F.3d at 838. For all the reasons discussed above, this Court's reversal on the latter issue does not compel any particular conclusion on the former. See Pet. App. 3a, 8a-13a; *Conforto*, 713 F.3d 1117-1119.

In light of the uniformity in the circuits, no "clarification" (Pet. 19) from this Court is necessary. Nor, in any event, is petitioner correct in suggesting (Pet. 19-20) that this case is the Court's last chance to address the question presented. Experience has shown that claimants who believe their cases belong in district court will file there, notwithstanding any MSPB guidance to the contrary. See *Kloeckner*, 639 F.3d at 836 (claimant filed in district court notwithstanding advisement to file in the Federal Circuit); *Burzynski* v. *Cohen*, 264 F.3d 611, 616 (6th Cir. 2001) (similar);

Powell v. *Department of Def.*, 158 F.3d 597, 598 (D.C. Cir. 1998) (similar); *Sloan* v. *West*, 140 F.3d 1255, 1258 (9th Cir. 1998) (similar). Should a claimant do so, the question presented here could potentially be addressed by the regional circuit on appeal. And even if the district court simply transferred the case to the Federal Circuit (see Pet. 20), the claimant could seek review of the question presented in this Court following a final decision from the Federal Circuit. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys

DECEMBER 2016